

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 CONSTANCE MELKONIAN,

12 Plaintiff,

13 vs.
14

15
16 MICHAEL J. ASTRUE, COMMISSIONER
OF SOCIAL SECURITY,

17 Defendant.
18

CASE NO. 06CV2081 JLS (BLM)

**ORDER (1) OVERRULING
PLAINTIFF'S OBJECTIONS, (2)
ADOPTING MAGISTRATE
JUDGE'S REPORT AND
RECOMMENDATION, (3)
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT, and
(4) GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

(Doc. Nos. 35, 57, & 64)

19 **BACKGROUND**

20 Constance Melkonian ("plaintiff") was found disabled as of May 28, 1986, her date of
21 birth, and received supplemental security income ("SSI") benefits during her childhood for
22 Tetralogy of Fallot with pulmonary atresia, a cardiac condition. Plaintiff had corrective surgery
23 for the Tetralogy of Fallot in May 1989. Plaintiff was also diagnosed with scoliosis of the spine in
24 1992, and successfully underwent a spinal fusion in May 1997.

25 In the present action, plaintiff seeks declaratory, injunctive, and mandamus relief arising
26 from the Social Security Administration's ("SSA") termination of the SSI benefits on September
27 1, 2003. Plaintiff objected to the SSA's decision and brought her case before an Administrative
28 Law Judge ("ALJ"). On June 18, 2005, the ALJ issued companion opinions—the first concluding

1 that plaintiff lost eligibility for SSI benefits on May 1, 2000,¹ and the second concluding that
 2 plaintiff was ineligible for adult benefits. Plaintiff obtained review through the Appeals Council,
 3 which considered new evidence submitted by plaintiff and affirmed the ALJ's decision on May 25,
 4 2006.

5 Plaintiff then initiated the present action in the Southern District of California on
 6 September 25, 2006 and amended the complaint on October 30, 2006. (Doc. No. 1.) The action
 7 was originally assigned to the Hon. Barry T. Moskowitz.² Judge Moskowitz granted the
 8 Commissioner of Social Security's ("Commissioner") motion to dismiss all causes of action in the
 9 First Amended Complaint, except the claim for judicial review of the Commissioner's decision
 10 ceasing childhood benefits and denying adult benefits, pursuant to 42 U.S.C. § 405(g). (Doc. No.
 11 22.) Plaintiff appealed Judge Moskowitz's Order to the Ninth Circuit Court of Appeals on August
 12 6, 2007 (Doc. No. 33), and, while the appeal was pending, plaintiff filed her motion for summary
 13 judgment (Doc. No. 35). After the Ninth Circuit dismissed the appeal for lack of jurisdiction
 14 (Doc. No. 48), the Commissioner filed a cross-motion for summary judgment on February 1, 2008
 15 (Doc. No. 57).

16 On July 25, 2008, Magistrate Judge Barbara Lynn Major issued a Report and
 17 Recommendation ("R&R") that this Court grant defendant's motion for summary judgment and
 18 deny plaintiff's motion for summary judgment. (Doc. No. 64.) The R&R concluded the ALJ
 19 based his decision on substantial evidence, which was consistent with evidence that plaintiff
 20 submitted from the period following the administrative hearing. The R&R further rejected
 21 plaintiff's contention that the SSA "lied" about plaintiff's failure to appear for a medical
 22 consultation in 1998, reasoning that, inter alia, the issue was moot because the SSA subsequently
 23 allowed plaintiff to file for reconsideration and extended plaintiff's benefits until 2003.

24 Plaintiff filed her objections to the R&R on September 15, 2008. (Doc. No. 68.) The
 25

26 ¹ Despite the ALJ's ultimate determination of ineligibility during the May 2000—September
 27 2003 period, plaintiff actually received benefits in that period, based on the SSA's granting a request
 for reconsideration by plaintiff's parents after a prior termination of benefits in 1999.

28 ² The case was reassigned to the Hon. Janis L. Sammartino on September 27, 2007. (Doc. No.
 40.)

Commissioner replied to the objections on October 6, 2008 and urged the Court to adopt the R&R.
(Doc. No. 69.)

LEGAL STANDARD

Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews de novo those portions of the Report to which either side objects, but no others. Thomas v. Arn, 474 U.S. 140, 149 (1985); United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Unsuccessful applicants for SSI benefits may seek judicial review of the Commissioner's final decision pursuant to 42 U.S.C. § 405(g). The ALJ's decision to deny benefits will only be disturbed if it is not based on "substantial evidence or if it is based on legal error." Magallanes v. Brown, 881 F.2d 747, 750 (9th Cir. 1989). The substantial evidence inquiry is solely whether the record, read as a whole, contains such evidence as would allow a reasonable mind to accept the ALJ's conclusions. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982); see also Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001) ("substantial evidence is more than a mere scintilla, but may be less than a preponderance"). If the evidence supports more than one interpretation, the Court must uphold the ALJ's decision. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). The ALJ is entitled to draw inferences logically flowing from the evidence. Sample, 694 F.2d at 642. The Court may reverse the ALJ's decision and direct the Commissioner to award benefits, without remanding for additional evidence and findings, only

if the record has been fully developed and further administrative proceedings would serve no useful purpose. Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002) (internal citations omitted).

DISCUSSION

Plaintiff has filed sixty-two (62) pages of objections. In large part, these objections consist of issues the Court cannot reach here. Plaintiff argues extensively in support of her federal constitutional claims (see Objections, at 43-47, 49-52) and her entitlement to monetary damages for the cost of her various surgeries (see id., at 13, 37, 58-60), even though Judge Moskowitz already dismissed those claims and the Ninth Circuit denied plaintiff's appeal for lack of

1 jurisdiction. Plaintiff also asks the Court to weigh the evidence differently from the ALJ, but
2 Ninth Circuit precedent requires this Court to affirm the ALJ's decision in the face of any
3 conflicting evidence. See Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (citing, inter alia,
4 Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)). Finally, plaintiff repeatedly insists the
5 Court award disability benefits without remanding the case to the SSA (see Objections, at 4, 35,
6 39), but such a conclusion would require the Court to find that "further administrative proceedings
7 would serve no useful purpose." McCartey, 298 F.3d at 1076. In fact, the Ninth Circuit has
8 subsequently explained that McCartey allows the Court to remand to the ALJ to make credibility
9 determinations regarding evidence that conflicts with the ALJ's conclusion. Connett v. Barnhart,
10 340 F.3d 871, 876 (9th Cir. 2003). The Court declines to exclude categorically the possibility of
11 remand.

12 Many of plaintiff's objections also mirror the same arguments she has made throughout
13 this litigation. The R&R responded to these arguments with thorough, careful analysis. The R&R
14 reviewed the "substantial evidence" in support of the ALJ's findings that plaintiff's childhood SSI
15 benefits were properly terminated, and that plaintiff was ineligible for adult SSI benefits. The
16 R&R further reasoned that the ALJ's decision was not based on the purported "lies" of Mary
17 Murillo, the SSA officer who conducted a hearing on plaintiff's request for reconsideration of
18 cessation of benefits back in 2000. Finally, the R&R addressed the evidence plaintiff presented
19 after her hearing before the ALJ, and explained why that evidence did not entitle plaintiff to
20 eligibility for SSI benefits. The Court has reviewed the R&R's analysis de novo and concludes
21 that "substantial evidence" supported the ALJ's decision to deny SSI benefits. If the Court were to
22 respond to each of petitioner's individual objections, the Court would simply repeat Magistrate
23 Judge Major's written analysis. That analysis soundly comports with the legal standard that
24 directs the Court to uphold the ALJ's decision when and if the evidence supports more than one
25 interpretation.

26 For the sake of completeness, however, the Court will specifically address certain issues
27 related to the evidence plaintiff submitted for the first time in 2006. Plaintiff's objections claim
28 that she should be found disabled because she had an aneurysm of her aortic root which, if

1 ruptured, “would be a sudden and likely fatal event.” (Exhibits to Objections, at 140 (April 6,
 2 2006 Outpatient Consultation by Mark Plunkett, M.D.)) Because the aneurysm was expected to
 3 result in death and is a listed impairment in the Disability Evaluation Under Social Security Blue
 4 Book, plaintiff argues for “an irrefutable presumption of disability . . . without any specific finding
 5 as to Plaintiff’s ability to perform her past work or any other jobs, and irrespective as to any other
 6 available functioning capacity[.]” (Objections, at 33; see 20 C.F.R. pt. 404, subpt. P, App. 1 §
 7 4.10.) Plaintiff also refers to an attack of arrhythmia that she had on July 21, 2006, during her
 8 recuperation from surgery to repair the aneurysm. Id. § 4.10. The ALJ’s ruling found “the
 9 objective medical evidence” did not establish an aortal aneurysm or recurrent arrhythmia (see
 10 Administrative Record (“AR”), at 105), but the ALJ’s decision was rendered in 2005. The
 11 Appeals Council acknowledged the aortal aneurysm but still concluded that plaintiff was not
 12 disabled. The R&R implies at several points that the Appeals Council considered all the 2006
 13 evidence plaintiff submitted from her treating physicians, Dr. Plunkett and Dr. Gregory Child.
 14 (See R&R, at 20:11-13, & 23:6-8.) However, the Appeals Council’s decision is dated May 25,
 15 2006 (AR, at 80), and some of plaintiff’s new evidence was dated July 2006. The Court feels
 16 compelled to address the implications of the July 2006 evidence on the conclusion reached by the
 17 Appeals Council.

18 The disability analysis involves a “five-step sequential evaluation process.” 20 C.F.R. §
 19 416.920(a)(4). The order of the steps is important because “if [the SSA] can find that [claimants]
 20 are disabled or not disabled at a step, [the SSA] make[s] [its] determination or decision and [does]
 21 not go on to the next step.” Id. All parties agree that plaintiff was not disabled under the first step
 22 because she was not “doing substantial gainful activity.” Id. § 416.920(a)(4)(i). The second step
 23 “considers the medical severity of [the claimant’s] impairment(s)” and finds the claimant not
 24 disabled where the claimant “do[es] not have a severe medically determinable physical or mental
 25 impairment”.³ Id. § 416.920(a)(4)(ii). A claimant’s impairment, or combination of impairments,
 26 is not severe unless it “significantly limits [the claimant’s] physical or mental ability to do basic

27
 28 ³ The severe impairment must also meet a “duration requirement,” which requires that the
 impairment have lasted for a continuous twelve months, be expected to last that amount of time, or
 be expected to result in death. 20 C.F.R. § 416.909.

1 work activities”. Id. § 416.920(c); accord 42 U.S.C. § 423(d)(2)(B); 20 C.F.R. § 404.1521. Here,
2 the Appeals Council, considering the new evidence plaintiff submitted following the hearing
3 before the ALJ, concluded that plaintiff was precluded from performing “heavy exertional work
4 functions” and enumerated three severe impairments: Tetralogy of Fallot, scoliosis, and
5 aneurysmal dilation of the aortic root. (AR, at 78-79.) The third step considers whether the
6 claimant’s severe impairments “meet[] or equal[]” a listed impairment. 20 C.F.R. §
7 416.920(a)(4)(iii). Although the SSA automatically finds the claimant disabled when the
8 claimant’s impairment meets or equals a listed impairment, id. § 416.920(d), the Appeals Council
9 here found that plaintiff’s impairments did not meet or equal the listed impairments, reasoning that
10 plaintiff’s impairments had improved (in part, because of the surgeries plaintiff had undergone).
11 (AR, at 78-79.)

12 The analysis then continues to the fourth and fifth steps, which both require an assessment
13 of the claimant’s “residual functional capacity.” 20 C.F.R. § 410.920(a)(4)(iv)-(v). The residual
14 functional capacity is the most work a claimant can do, in spite of the limitations from the
15 impairment. Id. § 416.945(a)(1). The Appeals Council concluded that plaintiff had the residual
16 functional capacity for medium work. Here, plaintiff has no past relevant work, so the fourth step
17 (whether the claimant can still do her past relevant work) is essentially moot. See id. §
18 416.920(a)(4)(iv). The fifth and final step requires consideration of the residual functional
19 capacity along with the claimant’s age, education, and work experience. Id. § 416.920(a)(4)(v).
20 Explicitly considering all these relevant factors, the Appeals Council concluded that plaintiff was
21 not disabled. (AR, at 78.)

22 The Court finds that “substantial evidence” supported the Appeals Council’s conclusion
23 that plaintiff’s dilated aortic root did not meet the listed impairment of “Aneurysm of aorta or
24 major branches”. See 20 C.F.R. pt. 404, subpt. P, App. 1 § 4.10. The Appeals Council referred to
25 Dr. Plunkett’s notes from the March 17, 2006 consultation with plaintiff, in which Dr. Plunkett
26 stated that rupture of the aortic root could be a fatal event. Nonetheless, in support of the Appeals
27 Council’s conclusion, the notes from the March 2006 consultation confirmed that plaintiff was
28 experiencing no detectable symptoms of cardiac problems. The recommendation for surgery was

1 based solely on the findings of a CT scan that plaintiff had undergone in December 2005.
2 Furthermore, Dr. Plunkett and plaintiff mutually agreed to postpone the surgery in July 2006 so
3 that plaintiff could complete her semester of studies. Although the Appeals Council did not have a
4 chance to review the July 2006 post-operative report, that report actually supports the Appeals
5 Council's decision to deny benefits, because the report indicates that plaintiff obtained the needed
6 surgery to address her aortic root dilation. The "Cardiovascular System" section of Appendix 1 to
7 subpart P explicitly contemplates delaying a finding of an impairment where the claimant
8 "recently had a corrective cardiac procedure." *Id.* § 4.00(B)(4)(a)(ii). The July 21, 2006
9 echocardiogram report confirms the success of the surgery, as plaintiff's aortic valve appeared
10 "normal". (AR, at 32.) Because plaintiff disputes only the classification of her aortal aneurysm,
11 and does not allege error in the determination of her residual functional capacity, the Court finds
12 substantial evidence to support the conclusion that plaintiff was not disabled on the basis of her
13 aortal aneurysm.

14 Although the Appeals Council's decision does not mention the arrhythmic episode that
15 took place during plaintiff's recuperation from surgery, the Court has reviewed the R&R's analysis
16 de novo and finds it correct. To qualify as a listed impairment, arrhythmia must be "recurrent,"
17 which the regulations define as occurring at least three times in a twelve-month period. See 20
18 C.F.R. pt. 404, subpt. P, App. 1 §§ 4.00(A)(3)(c), 4.05. While the arrhythmic episode
19 understandably caused great consternation to plaintiff in the aftermath of her surgery, nothing in
20 the record establishes that she had such episodes with the frequency required to meet the standard
21 of a listed impairment. The R&R cites relevant portions in the record to support its conclusion that
22 plaintiff's July 2006 arrhythmic episode was plaintiff's second documented episode in nine years.

23 //

24 //

25 //

26 //

27 //

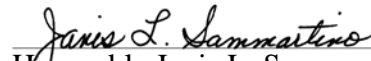
28 //

CONCLUSION

For the reasons stated herein, the Court **ADOPTS** Magistrate Judge Major's Report and Recommendation. The Court **GRANTS** defendant's motion for summary judgment and **DENIES** plaintiff's motion for summary judgment. Because Judge Moskowitz previously dismissed plaintiff's other causes of action, this Order **CONCLUDES** the litigation in this case. The Clerk **SHALL CLOSE** the file.

IT IS SO ORDERED.

DATED: April 21, 2009



Honorable Janis L. Sammartino
United States District Judge